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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 412.

AUBRY WILLIAMS,
Petitioner,

vs.

STATE OF GEORGIA.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF OF PETITIONER ON THE MERITS.

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I.

OPINION BELOW.

The opinion of the Supreme Court of Georgia affirming the overruling of petitioner's extraordinary motion for a new trial here under attack is reported in 210 Ga. 665, 82 S. E. 2d 217.

II.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner under 28 U. S. C. 1257 (3), petitioner contending that the Court below has decided a federal question of substance contrary to the ruling of this Court in Avery v. Georgia, 345 U. S. 599, 97 L. Ed. 1244, 73 S. Ct. 891. The judgment of the Supreme Court of Georgia is dated May 10, 1954, and a motion for a rehearing was denied by order dated and entered May 31, 1954 (R. 23). Petition for certiorari was filed July 9, 1954.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

(i) Constitution of the United States, U. S. C. A. Const. Art. XIV, Sec. 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

(ii) Code of Georgia, 1933, Sec. 59-805:

> "Every person indicted for a crime or offense which may subject him to death or imprisonment in the penitentiary for not less than four years may peremptorily challenge 20 of the jurors impaneled to try him, and every person indicted for an offense which may subject him to imprisonment in the penitentiary for any time less than four years may peremptorily challenge 12 of the jurors impaneled to try him; and the State shall be allowed one-half the number of peremptory challenges allowed to the prisoner."

IV.

QUESTIONS PRESENTED FOR REVIEW.

Whether a trial court practice of placing names of white jurors on white paper, and names of negro jurors on yellow paper, in the traverse jury box of such court discriminates in violation of Constitution of the United States, Art. XIV, Sec. 1, against a negro defendant on

trial for the homicide of a white man, by permitting control of the number of negro jurors, selected, drawn, summoned, organized, and impaneled for traverse jury duty, the State having by statute the right to challenge peremptorily ten jurors on such trial, and actually challenging the only qualified negro juror.

V.

STATEMENT OF THE CASE.

Petitioner was tried under an indictment for the offense of murder in the Superior Court of Fulton County, Georgia, during the March Term, 1953, and was found guilty of the offense of murder on March 10, 1953. The verdict of the trial jury made a sentence of death by electrocution mandatory. The Supreme Court of Georgia in Case No. 18,348, decided October 14, 1953 (Williams v. State, 210 Ga. 207, 78 S. E. 2d 521), affirmed the judgment of the trial court overruling his motion for a new trial complaining of errors in the course of the trial. During the November Term, 1953, of Fulton Superior Court, on December 1, 1953, petitioner presented in the trial court a written motion for a new trial upon grounds not previously presented complaining that on his trial he had been denied the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. In the extraordinary motion for a new trial, a pleading, petitioner alleged that he, a Negro, on trial for the murder of a white man, was discriminated against and denied the equal protection of the laws by reason of the circumstances of the selection, drawing, summoning, organizing, impaneling, and challenging of the jury sworn to try him (R. 5). He alleged that the traverse jury box from which were drawn the names of the jurors put upon him on his trial contained white tickets bearing the names of white jurors, and yellow

tickets bearing the names of Negro jurors. On February 18, 1953, one of the Judges of Fulton Superior Court drew from one of the compartments of the traverse jury box some number of tickets in excess of 120, bearing the names of jurors, to serve as petit or traverse jurors for the trial of civil and criminal cases in Fulton Superior Court during the week of March 9, 1953 (R. 4, 5). The tickets were handed by the Judge to a deputy sheriff, who handed them to a deputy clerk for listing, and, following listing, returned them to the Judge, who placed them in another compartment of the jury box (R. 5). All handling and listing occurred in the presence of the Judge, who did not, however, personally verify the listing of names by the deputy clerk, nor the total number of names on the list by a count of the tickets. After the summoning of the jurors whose names appeared on the list, and after some number were excused, there were organized ten panels of twelve jurors for the trial of civil and criminal cases in Fulton Superior Court during the week of March 9, 1953, or a total of 120 jurors. Four of these jurors were Negroes. Panels 6, 7, 8, 9 and 10, each of twelve jurors, were assigned to serve in the criminal division of the court, all four of the negro jurors being included in these panels. No negro jurors were included in the panels assigned to serve in the civil division. A panel of 48 jurors, from those assigned to serve in the criminal division, was put upon petitioner upon his trial, and thirteen of these jurors were excused for cause. Three of the four Negro jurors were among those excused for cause. The name of the one Negro juror not disqualified appeared fourth upon the list of jurors as called over by the clerk for challenge, and upon the calling of his name by the clerk, and before being put upon the defendant, the prosecution exercised its first peremptory challenge and excused the juror, he being the first juror challenged by either side. This left no negro juror qualified to try petitioner among the jurors impaneled for the week of March 9, 1953.

By reason of the use of different colors for tickets in the traverse jury box, bearing the names of white and negro jurors, respectively, the operation of the mathematical laws of chance may be defeated, and it is made possible to keep the number of Negro jurors summoned for jury duty within the six peremptory challenges allowed the prosecution in any felony case, and well within the ten such allowed upon the trial of a capital felony, so that the State's counsel may in every case where a Negro is on trial absolutely assure that no member of his race will be sworn as a juror (R. 4).

The use of peremptory challenges by State's counsel as a means of preventing jury service by Negroes is well known to all solicitors-general, and in a reported decision of the Supreme Court of Georgia (Watkins v. State, 199 Ga. 81), reference is made to statements in public speeches by a solicitor-general that he used this means of preventing Negro jurors from serving in his court. With control of the number of negroes selected, drawn, summoned, organized or impaneled for jury service, peremptory challenges could effectively prevent a Negro juror from being sworn to try a case.

The trial court ordered the motion filed, and at a hearing subsequently had, without evidence being adduced, sustained a motion to dismiss by counsel for the State, on the ground that the motion failed to make a case for the granting of a new trial (R. 16).

The judgment of the trial court dismissing the extraordinary motion for a new trial was assigned as error as contrary to law (R. 16, 17), in petitioner's bill of exceptions timely filed, and these facts were relied upon in the Supreme Court of Georgia, where the exceptions were heard upon writ of error.

VI.

SUMMARY OF ARGUMENT.

The present case is controlled by the ruling of the Court in Avery v. Georgia, 345 U. S. 599, 97 L. Ed. 1244, 73 S. Ct. 891, involving the identical jury selection process complained of here.

VII.

ARGUMENT.

Practices adopted in the selection, drawing, summoning, organizing and impaneling of jurors for the trial of persons accused of crime, in State Courts, and particularly such practices as they affect the rights of Negroes accused of crime to equal protection of the laws, have been under scrutiny by this court. The very practice now complained of was condemned by this court in **Avery v. State of Georgia,** 345 U. S. 559, 97 L. Ed. 1244, 73 S. Ct. 891.

Here there is for consideration whether the ruling in the **Avery** case should control under a state of facts plainly illustrating how the actual serving of Negroes on juries sworn to try members of their race can be prevented through the exercise of peremptory challenges by the prosecution, coupled with control of the number of such jurors selected, drawn, summoned, organized, or impaneled.

Although Negro jurors were selected, drawn, summoned, organized, and impaneled, not one was sworn to try the case. Not one was challenged by the accused, nor did he have an opportunity to challenge a Negro juror. The circumstances that only four Negro jurors were included among the 120 organized for the week of March 9, 1953; that all four were included in the panels assigned to the criminal division; and that at the first opportunity the prosecution challenged the sole qualified Negro juror among 107 jurors then impaneled, may have been purely coincidental. On the other hand, by the device of white and yellow tickets, the same result, that no Negro sat on the jury, could have been achieved by design, with the same facts appearing in the record. No Negro sat on the jury. The fact that names of jurors were on tickets en-

abling white and Negro talesmen to be distinguished, each from the other, made discrimination possible.

The decision of the court below is believed to be erroneous, and not in accord with the decision of this court in **Avery v. State of Georgia**, supra. In the **Avery** case, this court condemned the practice of issuing white and yellow tickets for the names of white and Negro jurors in the Fulton County traverse jury box. In the **Avery** case, there were no Negroes on the jury put upon the accused. The questions relating to the legality of the array were raised by a written challenge to the array of traverse jurors, timely filed and insisted upon. Here a challenge to the array would have been premature and speculative, and only when counsel for the State, having the first jury challenge, peremptorily challenged the one remaining Negro juror was the end of the discriminatory process reached.

The court below stopped at a procedural stage short of the peremptory challenge of the sole remaining Negro juror in its consideration of the case, and held that the accused's last chance to make the objection sought to be made was when the jury was put upon him, by a challenge to the array, and that having failed thus to chalienge the array, the objection came too late. Having advanced one procedural reason for upholding a verdict by a jury admitted tacitly to have been illegal, the court below went outside the record for other procedural reasons, and avoided giving application to the ruling of this court in the **Avery** case. By this course, a decision on the constitutional question which must have been favorable to petitioner was avoided, and petitioner's trial in effect held to have been legal. The decision below is believed to be erroneous by reason of the narrow view of the case taken by the court.

VIII.

CONCLUSION.

Since petitioner was not afforded the opportunity to support his extraordinary motion for a new trial by proof, but the same was dismissed, petitioner respectfully prays that the decision below be reversed, with direction that the extraordinary motion be heard and if supported by proof, a new trial be granted petitioner.

Respectfully submitted,

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